LEGAL DEFENSE TRUST TRAINING BULLETIN

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SUPERIOR COURT ORDERS RIVERSIDE COUNTY TO ARBITRATE ASSOCIATION'S CLAIMS OF VIOLATION OF DIRECTOR'S PROCEDURAL RIGHTS

HOSKINS CASE FOCUSES ON ASSOCIATION'S PRIVILEGE TO ADDRESS MEMBERS AT ROLL-CALL AND THE RIGHT TO LEGAL REPRESENTATION DURING INVESTIGATIONS

Riverside County Superior Court Judge Dallas Holmes has granted a petition to order the County of Riverside to arbitrate the claims of Riverside Sheriffs' Association (RSA) and Director Ray Hoskins, that the Sheriff's Department (RSD) violated Hoskins' right to legal representation during an investigation, and that it interfered with RSA's effort to communicate with its members during a roll-call presentation, contrary to established past practice permitting RSA reasonable opportunity to address members about their individual rights. *Riverside Sheriffs' Association, et al v. County of Riverside*, RCSC No. RIC 387289, September 18, 2003.)

One of the most important and critical functions of a public employee organization is that of communicating with its members about their rights established by state and federal law, and MOU rule. RSD has historically permitted RSA officials a reasonable amount of "roll- call" time to do so, depending on the fulfillment of RSD's official needs and time available for that purpose. This accommodation is sufficiently customary and well-settled so as to constitute a "past practice" in the relationship between RSD and RSA.

BACKGROUND

Within this historical setting, RSA Director Ray Hoskins sought time from Department supervisors to present information to an assembled roll-call about members' rights to representation in investigatory proceedings. A department supervisor in attendance took issue with Hoskins' informational presentation, and discouraged those in attendance from applying the principals taught, in a manner which arguably interfered with Hoskins' efforts to communicate the information. Hoskins was directed to refrain from future presentations unless the content of the presentation was approved beforehand.

That situation resulted in a written complaint by RSA counsel to RSD, urging RSD management to refrain from such interference in the future. The complaint triggered an "investigation" featuring an "interview" (interrogation) of Hoskins, wherein he was directed to appear at an appointed time and place, to answer questions as "a witness".[1] Two tape recorders were in place at the time of the interview but Hoskins

[1] *See: Government Code* §3303 regarding the right to representation at investigatory interviews.

was not permitted to personally tape record the proceedings, nor was he permitted, despite his timely request, to consult with or have legal and associational representation at the interview, and Hoskins was "ordered" to participate under threat of punitive action for the refusal to do so. Thereafter Hoskins was not permitted to have a copy of the taped interview. All of this was apparently based on RSD's determination that Hoskins was only "a witness", and not entitled to these rights as a consequence, according to his lieutenant.

THE "WITNESS ONLY" ILLUSION

As an aside, we in the General Counsel's office have long advocated that the "distinction" between "a subject" and "a witness" is illusory. Any law enforcement member, summoned for an investigatory interrogation, is *always* subject to becoming "an accused" if the interview discloses any arguable "acquiescence" to misconduct of another member, or where the statement made discloses grounds for alleging false or misleading statements, or "newly discovered evidence" targeted on the "witness". We have always emphasized that the right to representation should not depend upon the supervisor's own subjective views of the member's status as a "witness" or otherwise, but rather upon the employee's "reasonable fear than the interrogation *might* result in discipline being undertaken against him". Clearly, this is a situation calling for an abundance of caution. But it is the *employee* who carries the burden of requesting representation. It is not the *employer's* burden to offer or provide for it. Hence, if the *employee* reasonably fears some adverse action or prejudice arising from the interview, then representation should not be denied, if the employee asks for it.

A REASONABLE SOLUTION

On the other hand, not every supervisor's request for information, "chance encounter", or "routine supervisory contact" requires representation. That would be silly and unreasonable. The following rule should prevail at all times:

AN EMPLOYEE'S REQUEST FOR REPRESENTATION DURING INVESTIGATORY CONTACTS SHALL NOT BE UNREASONABLY DENIED. ANY INTERVIEW OF AN EMPLOYEE IN CONNECTION WITH AN INVESTIGATION, THAT THE EMPLOYEE REASONABLY BELIEVES MAY RESULT IN ADVERSE ACTION OR DISCIPLINE AGAINST THAT EMPLOYEE, SHALL ENTITLE HIM OR HER TO A REPRESENTATIVE OF CHOICE, WHO MAY BE PRESENT AT ALL TIMES DURING THE INTERVIEW.

The U.S. and California Supreme Courts long ago recognized that an employee, confronted by an employer's demand for information in an investigatory context, may require the assistance of a knowledgeable representative to adequately protect himself or herself in the process.[2] The simple, but far-ranging "duty to report the misconduct of another employee" is reason enough, to warrant the utmost caution on the part of the "witness-employee". The simple disclosure of awareness or suspicion on the part of a "witness-employee" of probable misconduct involving another employee, automatically triggers inquiry into whether the "witness" was "aware", "acquiesced", "failed to intervene" and "failed to report" in a timely manner. Of course, the ever-

[2] *See: NLRB v. J. Weingarten*, 420 U.S. 251, 95 S.Ct. 959 (1975); *Civil Service Association, Local 400 v. City and County of San Francisco*, (1978) 22 Cal. 3d 552, 567, 150 Cal.Rptr. 129, 138.

present threat of a "false and misleading" charge only doubles the risks inherent in being interviewed as a "witness only". Even where the "witness-employee" sees nothing wrong with what the subject-employee did or did not do, if the employer determines that misconduct occurred, the "witness" may suddenly become an additional accused.

SUMMARY

In summary, the line between "accused" and "witness only" is far too blurred and indistinct to permit a meat-axe methodology to separate employees into "subject" and "witness" categories in an investigation, permitting representation for "subjects", while denying it to "witnesses". Think about it: can you imagine a misconduct investigation that *guarantees at the outset*, that you as a "witness only" will never be subject to discipline, prejudice or adverse consequence, no matter what the investigation discloses about another employee, and regardless of what you say or do not say about it? If your answer is "Yes, I believe there are investigations where I, as a 'witness' , have no risks at all and cannot possibly be hurt by what I say (or don't say)," *then you must be bullet-proof.* But even if you are, get it in writing.

These very same rational concerns prompted Director Hoskins to seek a time-out, when he was confronted by his lieutenant, armed with two (2) tape recorders, who wanted to visit with him about the complaint that Hoskins evidently triggered by reporting the interference at the roll-call presentation. Each of his requests for time to call RSA to get representation, to tape record the interview himself, and to obtain a copy of the tape since he was not allowed to record his own, were rebuffed. Compelled by threat of insubordination, he (wisely)cooperated. Now it is time to undo what was done, and to ensure that it does not happen again.

CONCLUDING POINTS

The MOU grievance process provides for the resolution of employer-employee relations issues such as this, and can lead to arbitral decisions which, if adopted, will define Department policy. The RSA-Hoskins grievance focuses on two very important and wide-ranging issues confronting RSD and RSA all the time: (1) the need for respect and accommodation of RSA's legitimate efforts to educate its members and to provide for their welfare by, among many others, communicating with the members in the workplace, subject to reasonable restrictions as to time, place and manner; and (2) respect for individual members' constitutional and statutory rights during investigatory interviews.

It is in everyones' interest, regardless of position or place in the organization, to have guidelines in force that are sufficiently clear, reasonable and mandatory so that situations like the Hoskins experience do not occur. This is our objective in pressing this grievance. The Superior Court lawsuit was made necessary because the County of Riverside Human Resources (to be distinguished from the Sheriff's Department) officials *refused* to even process the grievance, in an utterly cavalier and irresponsible fashion. In my book, that equals *bad faith.*

STAY SAFE AND OUT OF HARM'S WAY!
-Michael P. Stone, Esq.-

RSA and Director Ray Hoskins have been represented throughout these proceedings by RSA-

LDT General Counsel Michael P. Stone, P.C., Lawyers, by Michael P. Stone and Deborah A. Krane.